

Quality Chemical, Incorporated and United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Petitioner. Case 6-RC-11422

September 4, 1997

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent parts are attached as an appendix). The request for review is denied as it raises no substantial issues warranting review.¹

MEMBER HIGGINS, dissenting.

I would grant the Employer's request for review.

¹ The only issue raised in the request for review is whether the Regional Director erred in finding the Employer's foremen were not statutory supervisors.

The Employer indicates in its request for review that the record is incomplete inasmuch as the signature page of Exh. 9 is missing. The indicated page is included in the record in the possession of the Board. Thus, the Employer's request to stay closure of the record is also denied.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of all full-time and regular part-time production and maintenance employees employed by the Employer at its Tyrone, Pennsylvania location; excluding all office clerical, professional, sales, guards, and supervisors as defined in the Act.⁴

Although basically in accord as to both the scope and composition of the petitioned-for bargaining unit, the parties are in disagreement on two issues. First, the Employer, contrary to the Petitioner, contends that the foremen employed in its production and maintenance operations are supervisors within the meaning of Section 2(11) of the Act. The Petitioner, to the contrary, contends that these employees have no greater authority than lead men and should be included in the unit. The Petitioner also takes the position that those employees labeled "temporary" should be excluded from the unit while the Employer maintains that, although they are labeled temporary, employees in this classification are actually

⁴ The parties have stipulated that the following positions: stock clerk, material handlers, laboratory technicians, all share a community of interest with other unit employees and should be included within the bargaining unit. The parties also stipulated that the following positions should not be included in the bargaining unit: plant manager, operations manager, production manager, developments manager, industrial relations manager, senior accountant, maintenance supervisors, shift supervisors, warehouse supervisor, accounting assistants, process engineers, associate engineer, chemist 1's, production chemist, project coordinators, environmental engineer, safety coordinator, quality coordinator, accounting clerk, purchasing agent, purchasing clerk, and secretaries.

recently hired probationary employees who, in the normal course of its operation, will become regular full-time employees provided that their work performance is acceptable.

There are approximately 100 employees in the unit petitioned for here including approximately 20 foremen. The number of temporary employees fluctuates. At the time of the hearing there were 11. There is no history of collective bargaining for any of the employees involved here.

The Employer, a Pennsylvania corporation with its principal office located in Jackson, Mississippi, and with facilities located in Dayton, Ohio, and Tyrone, Pennsylvania, engaged in the production and nonretail sale of intermediate specialty chemicals for the pharmaceutical, agricultural, dye stuff and automotive industries. Solely involved here is the Tyrone, Pennsylvania facility. The Tyrone facility consists of a number of separate buildings. Production operations are carried on in seven of these buildings and production and maintenance employees work in all seven.

The facility is under the overall supervision of the plant manager, Ivan Riggle. Reporting to him and directly responsible for all aspects of production operations is Production Manager Jay Kisslak. Reporting to Kisslak are four shift supervisors and reporting to each of them are five foremen, which is the category at issue here.

The production facility operates on a three-shift, round the clock, 7 days per week basis. Production employees are divided into four crews which work together on a shift and which regularly rotate from shift to shift. The shift times are 7 a.m. to 3 p.m.; 3 to 11 p.m.; and 11 p.m. to 7 a.m. Each crew is supervised by a shift supervisor and consists of 5 foremen and 17 or 18 production employees who are classified as operators. Each crew rotates from shift to shift as a unit.⁵ Production activities are carried on, as noted, in seven different buildings and employees are assigned to each of these buildings.

The Employer custom manufactures chemicals according to specifications and directions supplied by its customers for each order. The production employees, called operators, are responsible for running the equipment used in this manufacturing process. Their duties include transporting and loading raw materials, operating the various types of processing equipment, transferring chemicals from one area of the plant to another as part of the process, basic maintenance tasks, and monitoring the equipment and processes including the taking and documenting of readings on the equipment, and also the packaging of the finished product as required. The operators are generally assigned to a specific work area, usually a single building or pair of buildings, and remain there unless or until transferred. Each of these work areas is the responsibility of one of the five production foremen who work on each of the four shift crews and they in turn report to the shift supervisor who is in overall charge of that crew. Each foreman, according to his work area may have as few as two to as many as five operators who report to him.

The foremen also work on the processing equipment and in that capacity their duties are essentially the same as those of the operators. In addition, foremen have responsibility for

⁵ Also involved in the production operations are laboratory technicians and maintenance technicians, apparently two of each per shift. The parties have agreed that they are to be included in the petitioned-for unit.

overseeing the production process in their work area, which includes instructing operators as to the operations they are to perform, assigning operators to particular work stations, examining equipment and taking certain readings and measurements which are particularly critical to the operation. In this regard, since it is a custom manufacturing operation, each new batch or order to be produced may have unique aspects which require different procedures than those which have preceded it. As a result, with each new order to be produced (referred to as "campaigns" by the Employer), the operators must be given new instructions as to how to proceed and the foremen have responsibility for transmitting these directions to them. The foremen also have responsibility for assigning employees to particular duties and equipment as the need arises. In addition, when a shift supervisor is absent from the facility, either on vacation or for other reasons, a foreman will fill in in that capacity.

As noted, foremen are expected to man equipment and participate in the production process with the operators. They do have the ability to choose which equipment to assign to themselves and it appears from the record that some of the equipment requires only periodic monitoring and leaves its operator free to observe or oversee other aspects of the production process in the immediate work area. By various estimates appearing in the record, foremen spend from 50 to upwards of 75 percent of their time engaged in these direct production activities. In addition, they have responsibility to see that the production process in their assigned work area is running properly. This particularly involves the taking of certain readings and samples from the equipment to ensure the quality of the product. In addition, foremen have responsibility for seeing that all safety procedures are followed and that all safety equipment is properly used throughout the production process.

In overseeing the production process in their work area, the foremen observe the operators and take critical measurements and readings. If an operator has a production problem or needs direction, the operator will consult the foremen in the first instance. As previously noted, the foremen also have responsibility for the observance of safety regulations within their area. As a part of this function, when outside contractors or maintenance personnel are to perform work in their area, the foreman is responsible for reviewing the safety aspects of the job and must sign off on a form indicating that all safety requirements have been met before the work can proceed. At the conclusion of the project, the foreman is also responsible for checking that the area has been left in a safe condition before the job is considered completed.

Foremen have no authority to hire or fire employees. However, when applicants for employment are under consideration, part of that process includes their being shown around parts of the production facility and this is done by a foreman who also interviews them during this tour. Operators also take part in this informal orientation for applicants. At the conclusion, the foreman will complete a form evaluating the applicant while any operators involved will be asked to state their opinions. This input then becomes a part of the hiring process, although the final decisions on all hiring are made by upper management.

While foremen can and do instruct operators in how to perform their work and as to safety procedures to follow, they do not directly administer any discipline. They do not

have authority to issue any written disciplinary actions, nor can they independently remove employees from the job or send them home. These and all other disciplinary actions are the exclusive province of the shift supervisors and upper management.

Scheduling of employees is basically done by the shift supervisor as to vacations or other time off. Employees calling off work contact the shift supervisor as do any employees requesting to leave work in the middle of a shift. Shift supervisors also have final authority over the assignment of overtime, although foremen can and do advise the shift supervisor that overtime is needed and may suggest which employees should be offered that opportunity. These suggestions are often but not always followed by the shift supervisors.

Foremen do prepare written performance evaluations for both regular operators and for what are referred to as temporary employees. Foremen complete an annual evaluation form for each regular operator in their work area. The evaluation is then reviewed by the shift supervisor, who may modify or add to it, and thereafter the supervisor and the foreman meet jointly with the operator to review his performance. Advancement within the production department along the Employer's promotional hierarchy, from operator-trainee, to operator, to senior operator, with corresponding pay increases, is influenced by the employee's evaluation ratings.

As to "temporary employees," these are essentially newly hired operators undergoing a probationary training and orientation period. During this period, the foreman completes assessments of their performance and progress and takes part in a weekly meeting with the employee and shift supervisor to discuss their progress and problems, if any, and to set goals for the future. Eventually, usually after 90 days, if a temporary's work performance is satisfactory, they will be converted into a regular full-time employee.

Foremen are hourly paid, as are all operators and also the shift supervisors. Foremen earn approximately \$1 to \$1.50 more than senior operators, the next highest classification, and approximately \$2 to \$2.50 less than the shift supervisors. All hourly employees receive the same package of fringe benefits.

As to holiday schedules, for purposes of actually receiving the holiday off, the foreman and shift supervisor form one group on each crew which rotates the time off opportunities among themselves while all of the operators, a larger group, constitutes a second category which rotates a limited number of time off opportunities among themselves. Thus, the foremen have a greater opportunity for actual time off than do rank-and-file operators.

Foremen are evaluated annually by the shift supervisor on the same form used for the evaluation of operators. This evaluation form includes a category for "supervisory ability." However, the record indicates that foremen are only evaluated on supervisory ability concerning their performance on the occasions when they fill in for a shift supervisor.

All production employees, from shift supervisors down to and including temporaries, wear the same uniforms. All employees also eat in the same employee lunchroom. Employees keep their own timecards which are submitted to the shift

supervisor; the foremen do not have any responsibility in this area.⁶

As to the category of “temporary” employees, as already indicated, this label is applied to all new hires in the production area during the first 90 days of their employment. During this time, which is essentially a probationary period, the temporary employees are subject to frequent evaluation and review by the production foremen and shift supervisors and they may be dismissed if their work performance is unacceptable. However, presuming that their performance and improvement meet the Employer’s standards, temporary employees generally are retained and converted to regular full-time operators. The record indicates that this conversion takes place as openings for full-time positions become available and that if an opening is not immediately available, a temporary employee will be retained as a temporary until such time as an opening does become available. There is no indication in the record that these employees are hired for specific limited periods of time or to work only on specific limited projects or production runs.

In determining the existence of supervisory status, it must first be determined whether the individuals in question hold or exercise any of the 12 enumerated indicia of supervisory authority set forth in Section 2(11) of the Act and, if so, whether the exercise of that authority entails “independent judgment” or is merely “routine.”

In this case, as set forth above, it is the Employer which takes the position, contrary to the Petitioner, that the foremen are supervisors within the meaning of the Act. It is well settled that the party alleging the supervisory status of individuals at issue has the burden of proving that such status exists. See *Northcrest Nursing Home*, 313 NLRB 491 at 496 fn. 26 (1993); *Hydro-Conduit Corp.*, 254 NLRB 433 (1981); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). For the reasons set forth below, I find that the Employer has failed to sustain its burden of establishing that the foremen here exercise independent judgment as to any of the indicia of supervisory authority.⁷

It is uncontested in the record that none of the 22 foremen at issue here (20 production foremen and 2 maintenance foremen) have authority to hire, fire, lay off, recall, suspend, reward, or discipline other employees or to adjust grievances. It is clear that they have exercised no disciplinary authority at all over employees beyond reporting infractions to their superiors and do not even make recommendations in such circumstances. The foremen do assign employees to work

stations and duties. However, there is no evidence that they assign work or direct employees with the requisite discretion or independent judgment. Instead, the evidence indicates that the foremen’s role in assigning and directing employees’ work is primarily related to monitoring production and training production employees. Such duties are more consistent with their generally greater experience and their standing at the top of the Employer’s promotional hierarchy than it is evidence of supervisory authority. Further, there is no evidence in the record demonstrating that the foremen exercise independent judgment when they shift employees around within their respective work areas to get projects accomplished. See, e.g., *Brown & Root, Inc.*, 314 NLRB 19 (1994); and *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

Further, the foremen have no authority over employee scheduling for vacations, time off, or any other purpose. All of these functions are handled by the shift supervisors.

The foremen are hourly paid and basically have the same wages and fringe benefits as do concededly nonsupervisory employees, with the exception that their wage rate is incrementally higher than that of the “senior operators” directly below them in the employment hierarchy and they enjoy a marginally more advantageous holiday leave schedule.

The record indicates that foremen have responsibility for maintaining plant safety rules and procedures and must certify that certain in-plant work projects adhere to those regulations before the work can be performed. They also are responsible for seeing that other employees adhere to these safety standards. However, in this area as well, the foremen’s responsibility is essentially of a routine nature involving the application of established rules and procedures and carries with it no independent disciplinary authority in case of a breach.

The foremen do play a role in the evaluation of employees, including applicants for employment, new, so-called “temporary” employees, as well as regular full-time employees. However, in order to constitute evidence of supervisory status, such evaluations must be independently performed and must effectively recommend personnel action. See *Bayou Manor Health Center*, 311 NLRB 955 (1993), and *Northcrest Nursing Home*, supra at 498. In the instant case, such evidence is lacking.

As to the foremen’s evaluation of applicants for employment, the record indicates that only after undergoing a substantial screening and interview process are prospective employees given a tour of the plant facility by a foreman who also interviews them and then completes a simple evaluation form. Concededly, nonsupervisory operators also participate in this orientation process and have oral input concerning the applicant. Thereafter, all hiring decisions are effectively made by higher management from the production department and the Employer’s human resources staff.

As to new, so-called “temporary” employees, the foremen are responsible for completing evaluation forms on them at periodic intervals. However, the shift supervisors also have full input into this evaluation and concerning any goals or criticisms which are set forth for the new employees. The shift supervisors also attend all meetings with these new employees. Similarly, although the foremen perform annual evaluations of regular employees, the shift supervisors also have full input and review in these cases. Thus, while the foremen clearly contribute to the evaluation of new hires

⁶There are also foremen in the maintenance department who oversee the work of maintenance employees, who the parties agree are to be included in the bargaining unit. The record indicates that these maintenance foremen perform their functions in a manner similar to the production foremen. There is no evidence in the record that they have any significantly greater authority than that exercised by the production foremen. Accordingly, their unit placement will be the same.

⁷Sec. 2(11) of the Act defines a supervisor as:

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

when decisions on their retention are made, and to evaluations of regular employees which are considered in determining when employees are promoted up the promotional hierarchy at the Employer's facility, the record evidence wholly fails to establish that the evaluations are the sole or even principal source used in making these decisions. Further, the evaluations clearly are not the product of the foremen alone since (as the samples of the various types of evaluations in evidence demonstrate) each separate evaluation category is reviewed by both the foreman and his superior, the shift supervisor. Thus, I do not find that the evidence establishes a direct causal link between the evaluations and personnel actions affecting employees such as raises or promotions, or that the evaluations are the product of the foremen alone, and, accordingly, I do not find that the evaluations constitute evidence of supervisory status on the part of the foremen. See *Bayou Manor*, supra; *Plastic Industrial Products*, 139 NLRB 1066 (1962); and *United States Gypsum Co.*, 118 NLRB 20 29-30 (1957).⁸

Finally, the record indicates that the foremen substitute for the shift supervisors, who are acknowledged to be supervisors within the meaning of Section 2(11) of the Act. However, it is well established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial. See *Hexacomb Corp.*, supra; *Gaines Electric Co.*, 309 NLRB 1077, 1078 (1992); and *Canonie Transportation*, 289 NLRB 299, 300 (1988), citing *Aladdin Hotel*, 270 NLRB 838 (1984). As stated above, the record here is clear that the foremen substitute for their undisputed supervisors only when supervisors are sick, on leave, or otherwise temporarily absent from the facility. Therefore, even if all of the foremen at issue exercise statutory supervisory authority when they are substituting for the shift supervisors, their as-

sumption of supervisory duties is irregular and sporadic, e.g., during vacation period or on other unscheduled occasions, and therefore is insufficient to establish supervisory authority. See also *Latas de Aluminio Reynolds*, 276 NLRB 1313 (1985); and *Canonsburg General Hospital Assn.*, 244 NLRB 899 (1979).

In sum, based on the above and the record as a whole, I find that the Employer's production and maintenance foremen are not supervisors within the meaning of the Act and I shall include them in the unit herein found appropriate.

Turning to the issue of the "temporary employees," I find that the record clearly establishes that these individuals are regular, albeit newly hired employees who should be included in the unit. The record indicates that this label is assigned to newly hired employees during approximately the first 90 days of their employment but that it is essentially a misnomer. The employees are hired with the announced expectation that, provided their job performance is acceptable, they will in due course be converted to regular full-time employees. Even in circumstances where such employees reach the end of their probationary period and there are then no regular full-time positions open, they are retained as "temporaries" until such time as regular full-time positions become available, at which time they are moved into these positions. Finally, the record indicates that, for the most part, temporary employees have in fact been converted to full-time status in due course. Accordingly, based on the above and the record as a whole, "temporary employees" will be included in the unit found appropriate here.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees, including foremen and "temporary employees," employed by the Employer at its Tyrone, Pennsylvania, facility; excluding all office clerical employees, sales employees, professional employees and guards and supervisors as defined in the Act.

⁸ *E. L. Tech Research Corp.*, 300 NLRB 522 (1990), cited by the Employer in its brief is not to the contrary. In that case, the individual whose supervisory status was in dispute performed employee evaluations completely independently and the evaluations were directly linked to pay raises. Neither of these factors applies in the instant case.